

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**MISSISSIPPI COMMISSION
ON JUDICIAL PERFORMANCE****PETITIONER****VS.****2014-JP-00005-SCT****CHANCERY COURT JUDGE
JOE DALE WALKER****RESPONDENT**

**MEMORANDUM BRIEF ON BEHALF OF THE
MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE IN SUPPORT
OF THE COMMISSION'S PETITION FOR INTERIM SUSPENSION**

_____The Mississippi Commission on Judicial Performance ("Commission") herewith files this brief with the Supreme Court of Mississippi, in accordance with Rules 7 and 10D of the Rules of said Commission. This brief is submitted in support of the Commission's Petition for Interim Suspension of the Respondent judge during the pendency of the Commission's Inquiry Concerning a Judge No. 2013-082, relating to the conduct of Joe Dale Walker, Chancellor for the 13th Chancery Court District, State of Mississippi ("Respondent").

STATEMENT OF THE CASE

On May 3, 2013, the Commission received a litigant complaint against Respondent. At its meeting on October 11, 2013, the Commission found probable cause to file a Formal

Complaint against the Respondent following an investigation of the matter. The motion passed by a unanimous vote of all participating Commission members. Upon further motion duly made and seconded the Commission voted, pursuant to Rule 7 of the Rules of the Commission, that a show cause hearing be scheduled for interim suspension. An excerpt of the minutes of the meeting were attached as Exhibit 1 to the Commission's Petition. A copy of the Formal Complaint and Order to Show Cause were attached as Exhibits 2 and 3 to the Commission's Petition, respectively. The transcript and corresponding exhibits from the Show Cause Hearing conducted on October 31, 2013 and November 1, 2013 were attached as Exhibit 4 to the Commission's Petition. The Respondent filed his Answer to the Formal Complaint in Inquiry Concerning a Judge No. 2013-082 on November 22, 2013. A copy of the Respondent's Answer was attached as Exhibit 5 to the Commission's Petition. On November 27, 2013, the panel entered its Findings of Fact, Conclusions of Law, and Recommendation recommending that Respondent be suspended, with pay as required by statute, from performing the duties of his office, pending final determination of the inquiry; a copy of the findings were attached as Exhibit 6 to the Commission's Petition. On December 6, 2013, Counsel for the Respondent, Robert E. Evans, Esq. filed Respondent's Objections to Panel's Findings and Recommendations; a copy of the Respondent's objections were attached as Exhibit 7 to the Commission's Petition. After considering the panel's findings and recommendation, Respondent's written objections, and the transcript, on December 13, 2013, the Commission adopted the panel's recommendation for interim

suspension of the Respondent. An excerpt of the minutes of the December 13, 2013 meeting was attached as Exhibit 8 to the Commission's Petition. The Commission's Chairman, Judge H. David Clark, II, signed the Commission Findings of Fact, Conclusions of Law and Recommendation on December 19, 2013. A copy of the Commission Findings of Fact, Conclusions of Law and Recommendation was attached to the Commission's Petition as Exhibit 9.

Having considered the Panel's Recommendation and Respondent's Objections, including the testimony and the evidence introduced before the panel, the Commission's findings of fact are as follows:

Respondent is now, and was at all times mentioned in the Formal Complaint, the duly elected Chancellor for the 13th Chancery Court District, State of Mississippi. At all times relevant herein Respondent was acting in that official capacity. Hon. David Shoemake is the other Chancellor serving in the 13th Chancery Court District.

On or about July 14, 2010, Respondent signed a decree, file-stamped July 13, 2010, appointing Marilyn Denise Newsome as conservator ("the Conservator") of her daughter, Victoria Denise Newsome ("Victoria"), in *In the Matter of the Conservatorship of Victoria Denise Newsome*, Cause No. 2010-0146, in the Chancery Court of Simpson County, Mississippi ("the Conservatorship"). That decree was signed and entered in accordance with a petition requesting that relief, filed by the attorney for the Conservator, Keely R. McNulty, Esq. ("McNulty"), who was appropriately identified in the petition.

On or about January 10, 2011, a Petition for Authority to Compromise and Settle Disputed Claim, for Approval and Establishment of Trust, and for Other Relief was filed in the case asking that the law firm of Merkel & Cocke, attorneys for Victoria, be allowed to settle a medical negligence claim on her behalf in the approximate sum of \$3,000,000.00. The petition requested that after payment of attorney fees and litigation expenses the net settlement proceeds be used as follows:

- A) \$145,000.00 to the Conservator to purchase a home located at 657 Simpson Highway 149, Magee, Mississippi for the benefit of Victoria, plus the sum of \$25,000.00 to the Conservator for payment of taxes, insurance, utility deposits, utilities and upkeep on said residence pursuant to further order of the Court;
- B) \$17,255.05 to Marilyn Denise Newsome, individually, for past expenses incurred by Marilyn Denise Newsome on behalf of Victoria;
- C) \$1,057.00 to McNulty for legal services rendered for the benefit of Victoria related to child custody proceedings; and
- D) \$1,000,000.00 to be disbursed by the defendants or their insurers to fund the purchase of a structured settlement annuity, which in turn was to make the following annuity payments, payable to The Victoria Newsome Special Needs Trust (“the Special Needs Trust”), for a term certain and for the lifetime of Victoria:

- (I) \$4,100.00 per month, guaranteed 10 year(s), beginning on February 1, 2011 with the last payment on January 1, 2021;
 - (ii) \$4,200 per month life, guaranteed 20 year(s), beginning on February 1, 2021 with the last guaranteed payment on January 1, 2041;
 - (iii) Any guaranteed payments made after the death of Victoria to be made to the Special Needs Trust.
- E) the balance of the net settlement, \$563,670.75, to be paid in a lump sum to the Special Needs Trust.

On or about January 12, 2011, the aforesaid petition came on for hearing (“the settlement hearing”) and the relief requested was granted in part and denied in part. Victoria and her family were in immediate need of adequate housing, and the evidence was uncontradicted that the proposed home was “a good quality home, ... a good home for her, and is open in space (with) wider doors, and hallways, which she would need.”¹ The home had been selected, inspected and approved by the Conservator, Marilyn Newsome, Victoria’s mother, caregiver and would be occupant of the home. In addition the trustee of the Special Needs Trust, Richard Courtney, an acknowledged expert and himself the father of a special needs child with first-hand knowledge of the requirements for a home occupied by one with special needs, recommended the home as suitable for Victoria. Yet, with no contrary

¹ Transcript of the settlement hearing (Exhibit 2), at 17. (Exhibits introduced at the hearing before the panel on October 30 and November 1, 2013, are hereafter referred to as “Ex. 2.”)

evidence indicating that the home was unsuitable, Respondent refused to approve the purchase, stating: “We ought to run away from it. I don’t think we ought to back away. I think we ought to just run.... Forget about it.” *Id.* at 31. Respondent denied the request that \$145,000.00 be paid to the Conservator for the purchase of the home at 657 Simpson Highway 149, Magee, Mississippi and the attendant costs associated with the home. Instead Respondent immediately initiated the concept of building a new house, and said: “But, it looks to me like we ought to buy a substantial home. If we can’t buy one, we ought to build one.” *Id.* at 20. As the settlement hearing progressed, and with no evidence that constructing a home was preferable to purchasing an existing home, Respondent’s comments indicated that he wanted a home constructed, not purchased: “I don’t know why we can’t just build her something. Okay?” *Id.* at 30. “I think we need to build her a type house that she can get around in.” *Id.* at 30. “Let me just say this: We need to build her something out there that’s pretty big for her to get around in.... And I think you ought to get somebody locally there to do it.” *Id.* at 58-59. At that settlement hearing Respondent also, without any request or evidentiary support, increased from \$1,057.00 to \$5,000.00 the attorney’s fees to be paid to McNulty for her representation of Victoria in child support proceedings, in spite of representations in open court from McNulty that no petition had been filed, that she did not know whether the matter would be contested, and that “I didn’t want to ask the Court for more money, not knowing that it would definitely be utilized.” *Id.* at 26. McNulty submitted no itemization of her work but she did represent that the \$1,057.00 she requested was for her

time and expenses to date. *Id.* At the settlement hearing Respondent further ordered that the balance of the net settlement proceeds, \$729,727.75, be held in the Merkel & Cocke escrow account rather than being paid, as requested, into the Conservatorship, in spite of uncontradicted testimony and representations in open court that the result of that was effectively to disqualify Victoria from obtaining benefits from the Supplemental Security Income (SSI) and/or Medicaid programs for which she otherwise qualified. *Id.* at 6-7, 15, 28-29, 32, 34.² Had Respondent allowed the Conservator to purchase a home for Victoria, as requested, the Conservatorship would have owned the property, the Conservatorship's assets could have been used to pay taxes, insurance, and maintenance expenses for the home, and Victoria could have received SSI and/or Medicaid benefits.

In the months following the settlement hearing Respondent engaged in a course of conduct in which he participated in numerous *ex parte* meetings with McNulty and entered numerous orders, described below as follows:³

- A) On March 30, 2011, Respondent signed an order, file-stamped March 31, 2011, in which he denied a request by the Conservator to purchase a different home located at 132 Hummingbird Road, Magee, Mississippi, which the Conservator and Victoria both desired. In chambers, Respondent confided to witnesses that the home was located in a residential area largely occupied by

² Also, at the hearing before the panel Richard Courtney, an expert in administering special needs trusts, testified that Respondent's order disqualified Victoria from obtaining those benefits.

³ The order described in subparagraph I) below was signed by Chancellor Shoemaker, not by Respondent.

Caucasians and he did not believe that the Newsomes, who are African-American, would feel comfortable there. Instead, he ordered McNulty to purchase real estate on which a home for Victoria was to be constructed, he ordered the purchase of a mobile home to be used as a temporary residence for the Newsome family, and he ordered that funds be placed in a conservatorship account for the purchase of the real estate, the mobile home, the construction of a home, maintenance expenses, and other related expenses. He also ordered that \$1,450.40 be paid to Marilyn Denise Newsome for expense reimbursement and \$5,800.00 to McNulty for attorney fees for services of the type that Richard Courtney would have performed, probably without any cost. *Id.* at 43-44. No hearing was held or evidence submitted on the issue of whether the construction of a new home was in Victoria's best interest.

- B) Respondent directed McNulty to contact Jeff Boone to find property on which to build a house for the Newsomes. Respondent also directed McNulty to contact his nephew, Chad Teater ("Teater"), a/k/a C.T. Construction, to get the name of the architect/designer, Betsy Morrow, Teater routinely used to draft plans for houses, so that Morrow could prepare house plans for the Newsome home. Those directives to McNulty to take over responsibility for constructing the new home, and the fees to McNulty that Respondent subsequently approved for performing those services, were made in spite of McNulty's lack

of experience or qualifications. McNulty was a recent law school graduate with no previous experience, expertise, qualifications or training in real estate or construction. Richard Courtney, on the other hand, was both experienced and qualified, and he ~~had~~ explained at the settlement hearing that services such as those were what he expected to perform as trustee of the Special Needs Trust. *See* Ex. 2, at 43-44, 49-50.

- C) On April 18, 2011, Respondent signed an *ex parte* order, file-stamped the same date, directing the purchase of a certain tract(s) of land, the purchase of a mobile home to be placed on the property, payment of any costs associated with the purchase of the land and trailer, and directing that a special needs home be constructed on the property. The order further directed that \$61,774.00 be withdrawn from the net settlement proceeds to pay for the land and mobile home and that McNulty be paid \$2,750.00 for her services rendered. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held in connection with that order.
- D) On May 16, 2011, Respondent signed an *ex parte* order, file-stamped August 2, 2011, directing that \$8,000.00 be placed in the conservatorship account for utilities (\$4,000.00) and attorney fees to McNulty (\$4,000.00) for her services. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held in connection with that order.

- E) On June 8, 2011, Respondent signed an *ex parte* order, file-stamped June 9, 2011, approving house plans obtained and submitted by McNulty and directing the construction of the home after obtaining a minimum of 4 bids from local contractors. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held or evidence presented in connection with that order.
- F) On July 21, 2011, Respondent signed an *ex parte* order, file-stamped July 25, 2011, authorizing payments for the house plans drawn by Morrow (\$2,700.00), payment of utilities and maintenance expenses (\$5,000.00) and attorney fees to McNulty (\$4,500.00) for unidentified services. No itemized time sheet, billing statement or other evidence of time spent or expenses incurred by McNulty was submitted. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held or evidence presented in connection with that order.
- G) McNulty obtained 5 bids from general contractors based upon the house plans previously obtained. Respondent then met with McNulty in chambers and reviewed the bids submitted, including a bid from Respondent's nephew, Teater, a/k/a C.T. Construction. Upon discovering that the bid submitted by C.T. Construction in the sum of \$273,075.14 was much lower than the other bids received, Respondent was concerned about the difference between the

amount of Teater's bid and the next lowest bid. Respondent directed McNulty to contact Teater and to tell him to raise his bid. Teater later raised his bid by \$23,500.00, an amount just under that of the next lowest bidder.

- H) Due to his nephew's involvement as a bidder for the Newsome home, on July 21, 2011, Respondent signed an *ex parte* Order Transferring Cause for Limited Purpose, file-stamped July 22, 2011, transferring the case to the district's other Chancellor, David Shoemake, for the limited purpose of approving and accepting bids for the construction of the home for the ward. That order also directed that the case be transferred back to Respondent after the awarding of the bids. Respondent never disclosed, in that order or elsewhere, that Teater was his nephew. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held or evidence presented in connection with that order.
- I) On July 22, 2011, Chancellor Shoemake signed an Order Concerning Approval and Acceptance of Bids for the Construction of a Residence for the Ward, file-stamped August 2, 2011, authorizing the Conservator to accept the lowest bid, from C.T. Construction in the amount of \$273,075.14, for construction of a home, and transferring the case back to Respondent.⁴ No petition was filed on

⁴ Although other orders subsequently entered (and discussed below) were purportedly signed by Chancellor Shoemake, the case was never formally transferred back to Shoemake.

behalf of or notice given to the Conservator, and no hearing was held or evidence presented in connection with that order.

- J) On October 31, 2011, Respondent signed an *ex parte* order, file-stamped November 8, 2011, which directed that \$6,000.00 be placed in the conservatorship account for utilities (\$2,000.00) and attorney fees to McNulty (\$4,000.00) for her services. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held in connection with that order.
- K) On January 20, 2012, Respondent signed an *ex parte* order, *nunc pro tunc* to January 12, 2011 (the date of the settlement hearing), appointing McNulty the guardian *ad litem* for Victoria. Previously, McNulty's only formal appearance was as attorney for the Conservator. McNulty's appointment and service as guardian *ad litem* for Victoria placed McNulty in direct conflict with her role as attorney for the Conservator. No petition was filed on behalf of or notice given to the Conservator, and no hearing was held or evidence presented in connection with that order.
- L) On January 24, 2012, McNulty filed a petition, purportedly on behalf of the Conservator, requesting that \$23,000.00 be paid to C.T. Construction for reimbursement for tools and materials allegedly stolen from the construction site. The Conservator did not sign the petition or have notice that the petition had been filed by McNulty. Respondent instructed McNulty to submit an

order to Judge Shoemake, to whom the case was not assigned, for his signature. On February 2, 2012, an order was filed bearing what appears to be Chancellor Shoemake's signature. In that order \$23,000.00 was awarded to C.T. Construction for tools and materials stolen from the construction site. No hearing was held, no notice given to the Conservator and no evidence presented that the tools and materials were stolen because of any wrongdoing or fault on the part of the Conservator.

- M) Also on January 24, 2012, at the direction of Respondent, McNulty filed a Show Cause Petition against the Conservator, directing the Conservator to appear in court to show cause why she should not be held in contempt for failure to fulfill her duties as conservator. At a hearing on February 7, 2012, Respondent questioned the Conservator but no order was filed ruling on or disposing of the Show Cause Petition.
- N) On February 16, 2012, on the petition of Richard Courtney, as Trustee of the Special Needs Trust, Respondent signed an *ex parte* order transferring \$44,110.00 to the trust account without hearing or notice to the Conservator. However, the funds were specifically to be used to purchase a van for the benefit of the ward.
- O) On March 26, 2012, Respondent signed and marked "Filed" an *ex parte* Order finding, *inter alia*, that Victoria's home "is now complete per the approved

house plans and the Construction Management Agreement(,) (t)hat the *undersigned* has completed a final inspection of the permanent residence and the home is complete and approved(,) ... and that said contractor (Teater) be released from any further new construction on the home, with his only duty being to uphold his one year warranty ... *if this Court deems a repair/replacement necessary.*” (Emphasis added.) The order directed that a final draw of \$6,000.00 be paid to Teater. No petition was filed, no hearing was held, no notice given to the Conservator and no evidence presented that a final inspection of the home was made. In fact no final inspection of the home was made. No copy of the referenced Construction Management Agreement was attached to the order or, as far as the Commission can determine, to any other order in the court file; nothing in the record indicates that Respondent ever saw the Construction Management Agreement, or that he ever asked to see it, yet Respondent signed an order releasing his nephew from liability under it, limiting the Conservator’s remedy against his nephew to only that available under the Mississippi New Home Warranty Act, Miss. Code Ann. §§83-58-1, *et seq.*, and restricting even that remedy. The order contains a hand-written notation, initialed by “DM,” that it was received on April 24, 2012, presumably by the Chancery Clerk’s office. With the exception of this order and the order discussed in the next paragraph, every

other order in the court file is date-*stamped* “Filed”. As discussed below, on March 14, 2012, twelve days prior to the signing of this order and the order discussed in the next paragraph, the Conservator signed a letter addressed to McNulty terminating her services, identifying McNulty’s conflict of interest in representing both the Conservator and serving as guardian *ad litem*, requesting a copy of McNulty’s file, and requesting a refund of all fees received by her for her services. That same day an attorney, Terrell Stubbs (“Stubbs”), filed an entry of appearance as attorney for Marilyn Denise Newsome, individually and in her capacity as conservator for Victoria.

- P) On the same day that Respondent signed and marked “Filed” the previous order, March 26, 2012, Respondent also marked “Filed” an *ex parte* Order, purportedly signed by Chancellor Shoemaker, noted to be *nunc pro tunc* to August 2, 2011, which directed that \$23,500.00 be transferred from the Merkel and Cocke trust account to the conservatorship account for completion of the Newsome residence. The \$23,500.00 reflects the difference between what was initially presented to the court as the bid of C.T. Construction, \$273,075.14, and what McNulty later presented as the actual bid amount, \$296,575.14. The order recited that the previously approved sum of \$273,075.14 was a “typographical error.” No petition was filed, no hearing was held, no notice given to the Conservator and no evidence presented that the discrepancy was

due to a “typographical error.” As with the previous order signed the same day, this order contains a hand-written notation, initialed by “DM,” that it was received on April 24, 2012, presumably by the Chancery Clerk’s office. With the exception of this order and the order discussed in the preceding paragraph, every other order in the court file is date-stamped “Filed”.

Subsequent to Stubbs’ entry of appearance on March 14, 2012, McNulty made multiple attempts to withdraw and to file an adequate accounting, but those attempts were contested by the Conservator and Stubbs, resulting in a hearing on April 19, 2012.⁵ During that hearing McNulty was called to the stand and admitted that, at all times relevant to the matters described above, she acted at the direction of Respondent.⁶ At the conclusion of the hearing Respondent stated from the bench that McNulty was authorized to “withdraw from everything”.

Nevertheless, on April 24, 2012, McNulty filed the following pleadings:

- A) On her own behalf, an Amended Motion to Withdraw as Counsel (for the Conservator) and as Guardian *ad Litem* (for Victoria).
- B) On behalf of the Conservator, a Petition for Approval of Correction of Construction Funds Amount and To Authorize Transfer and Withdrawal of

⁵ On March 20, 2012, McNulty filed a Petition to Withdraw as Counsel for the Conservator, attached to which was a letter from the Conservator dated March 14, 2012, terminating her services. On April 9, 2012, McNulty filed a Petition for Approval of 2011 and Partial 2012 Annual Accounting. On April 17, 2012, McNulty filed a Motion to Withdraw as Counsel and as Guardian *ad Litem*, acknowledging that she had been acting both as counsel for the Conservator and as Guardian *ad litem* for Victoria.

⁶ McNulty likewise reported to Ralph Holiman, investigator for the Mississippi Commission on Judicial Performance, that her actions were directed by Respondent. Ex. 3.

Funds, alleging that the original bid of \$273,075.14 was wrong due to a “typographical error” and that the actual bid was \$296,575.15. That petition requested that the difference, \$23,500.00, be transferred to the conservatorship account. Yet that relief had already been granted, without notice to Stubbs or the Conservator, in the March 26, 2012 order allegedly signed by Judge Shoemaker;

- C) On behalf of the Conservator, a Petition for Approval of Contractor stating that C.T. Construction was the lowest bidder at \$273,075.14, requesting transfer of that amount to the conservatorship account for construction of the residence and authority to pay C.T. Construction’s monthly invoices. Notably, the C.T. Construction bid attached to the petition was for \$296,575.15. No notice of the filing of that petition was given to Stubbs or the Conservator; and
- D) On behalf of the Conservator, an amended Petition for Approval of Contractor similar to the previous one but adding requests for authority to pay certain expenses, including \$2,700 to Betty Morrow for her services in designing the house and “\$_____” to McNulty for her services related to the construction of the home. No notice was given to Stubbs or the Conservator.

On May 8, 2012, Respondent signed an Order, filed May 14, 2012, allowing McNulty to withdraw as counsel for the Conservator and as guardian *ad litem* of Victoria.

On May 24, 2012, Respondent signed an Order, filed May 25, 2012, approving

Terrell Stubbs' representation of the Conservator.

In November 2012, McNulty was appointed as Staff Attorney/Law Clerk for the 13th Chancery Court District Judges and the 13th Circuit Court District Judge. Respondent approved her appointment.

On October 14, 2013, Respondent signed an Order recusing himself from any further participation in the case, three days before the Commission issued its Formal Complaint against him.

In his testimony in the hearing before the panel on October 30, 2013 and November 1, 2013, Respondent demonstrated a lack of integrity and candor. His testimony was contradicted in multiple, material instances by statements made by McNulty to Ralph Holiman, investigator for the Commission introduced in evidence at the hearing. Those statements were against McNulty's interest, subjecting her to both civil and criminal liability; a reasonable person in her position would not have made those statements if she believed they were not true. Holiman's written reports of his interviews with McNulty, as well as his own live testimony relative to those interviews, including his convincing explanations of why he believed McNulty, together with the obvious fact that Respondent had considerable regard for McNulty, persuade the undersigned that on issues on which McNulty and Respondent differ, McNulty's statements are more credible than Respondent's testimony.

Respondent's conduct did not amount to just one offense, his violations were repeated and systematic, occurring over a period of more than a year and involving multiple orders

and *ex parte* meetings. That conduct stopped only after the Conservator hired another attorney, Stubbs, who entered his appearance and began an investigation into what had transpired. Based on the totality of his behavior, Respondent's conduct was egregious.

ARGUMENT

THE RESPONDENT SHOULD BE SUSPENDED DURING THE PENDENCY OF THE FORMAL COMPLAINT BEFORE THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE PURSUANT TO SECTION 177A OF THE MISSISSIPPI CONSTITUTION, MISSISSIPPI CODE ANNOTATED SECTION 9-19-13 AND RULE 7 OF THE RULES OF THE COMMISSION.

The Mississippi Commission on Judicial Performance has petitioned the Mississippi Supreme Court for the Interim Suspension of the Respondent, Chancery Court Judge, Joe Dale Walker after having considered the testimony and evidence, and in light of the preceding Findings of Fact.

The authority to suspend a judge is contained in Article 6, Section 177A, Mississippi Constitution of 1890, as amended. Section 177A states that by a two-thirds (2/3) vote the Commission may "recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending." Section 177A further provides that the Commission may recommend and the Supreme Court may suspend any judge for "... willful misconduct in office; ... [and] conduct prejudicial to the administration of justice which brings the judicial office into disrepute." Rule 7 of the Rules of the Commission on Judicial

Performance provides the procedure for such a suspension. Rule 7 provides for such a recommendation with or without a show cause hearing; in this Inquiry the Commission conducted a “show cause” hearing prior to considering whether or not to make a recommendation for interim suspension.

It is rare for this Commission to exercise its authority to recommend an interim suspension in accordance with Section 177A of the Mississippi Constitution of 1890, as amended; Mississippi Code of 1972, Annotated, Section 9-19-13; and Rule 7 of the Rules of the Commission. In reviewing a removal recommendation from the Commission the Supreme Court stated: “We have considered that removal from office [is an] appropriate sanction for the most egregious cases of judicial misconduct.” *Mississippi Comm’n on Jud. Perf. v. Sanders*, 749 So. 2d 1062, 1063 (Miss. 1999). And in *Mississippi Comm’n on Jud. Perf. v. Guest*, 717 So. 2d 325, 331 (Miss. 1998), the Court stated: “[R]emoval of judges has usually involved repeated or systematic abuses of their judicial office. As a general rule, this Court will not remove a judge from office for a first offense, absent a showing of personal gain.” But suspensions are not unprecedented. See *Mississippi Comm’n on Jud. Perf. v. Milling*, 651 So. 2d 531 (Miss. 1995); *Mississippi Comm’n on Jud. Perf. v. Spencer*, 725 So. 2d 171 (Miss. 1998); *Mississippi Comm’n on Jud. Perf. v. Willard*, 788 So. 2d 736 (Miss. 2001); *Mississippi Comm’n on Jud. Perf. v. Hartzog*, 822 So. 2d 941 (Miss. 2002); *Mississippi Comm’n on Jud. Perf. v. Osborne*, 876 So. 2d 324 (Miss. 2004); *Mississippi Comm’n on Jud. Perf. v. Martin*, 995 So. 2d 727 (Miss. 2008); and *Mississippi Comm’n on*

Jud. Perf. v. DeLaughter, 35 So.3d 1208 (Miss.2008). *See also, In re Maples*, 611 So. 2d 211 (Miss. 1992) (Judge Maples had previously been suspended pursuant to Section 177A and Section 9-19-13, but it was not reflected in the Mississippi Supreme Court's published Order); *Mississippi Comm'n on Jud. Perf. v. Hosemann*, Cause No. 2002-JP-02072-SCT; and *Mississippi Comm'n on Jud. Perf. v. Diaz*, Cause No.2003-JP-01653-SCT.

As in the cases cited above, the Commission should recommend the temporary suspension of Respondent, with pay, pending the resolution of the Formal Complaint. The purpose of a temporary suspension is not to punish Respondent or to jeopardize his case before the Commission or the Supreme Court. Rather, the purpose of an interim suspension is to maintain the probity and judicial appearance of any and all judges, for the protection of the people, *In re Franciscus*, 369 A. 2d 1190, 1194 (Pa. 1977), and to preserve the integrity of the judiciary. *Matter of Del Rio*, 256 N.W. 2d 727 (Mich. 1977). *See also, In re Kirby*, 350 N.W. 2d 344 (Minn. 1984).

The Mississippi New Home Warranty Act, Miss. Code Ann. §§83-58-1, *et seq.*, provides a consumer with (1) a one-year warranty that her home will be free from any defect due to noncompliance with building standards and (2) a six-year warranty that her home will be free from major structural defects due to noncompliance with building standards. Miss. Code Ann. §83-58-5(1). The order signed by Respondent on March 26, 2012 purported to eliminate the six-year warranty altogether, and even limited the one-year warranty to the Conservator's returning to Respondent's court and persuading Respondent that a repair or

replacement by his nephew was necessary: “... and that said contractor (Teater) be released ..., with his *only* duty being to uphold his *one* year warranty ... *if this Court deems a repair/replacement necessary.*” (Emphasis added.) Apart from those restrictions narrowly circumscribing the Conservator’s statutory remedies, that order eviscerated her common law remedies against Respondent’s nephew, including her remedies for negligence, breach of contract, and breach of the implied warranty of reasonably skilled workmanship. *See DiMa Homes, Inc. v. Stuart*, 873 So. 2d 140, 145 (Miss. 2004) (Although plaintiff’s damages did not fall within the Act, every contract contains an implied warranty written into it by law of reasonably skilled workmanship); *Little v. Miller*, 909 So. 2d 1256 (Miss. Ct. App. 2005) (The Act is not an exclusive remedy).

After McNulty was called to the stand to testify she refused to answer questions put before her and invoked her Fifth Amendment right against self-incrimination, rendering her an “unavailable” witness. Because her out of court statements to Holiman were statements against her interest, those statements were admissible at the hearing. Miss. R. Evid. 804(a), (b)(1).

In *Mississippi Comm’n on Jud. Perf. v. Hartzog*, 822 So. 2d 941 (Miss. 2002), the Mississippi Supreme Court considered the Commission’s request for Judge Hartzog’s interim suspension during the pendency of his felony indictment. The Court considered several factors in its discussion of whether temporary suspension was appropriate under the facts and

circumstances of his case. The factors considered by the Court there, and by the Commission here, are:

- 1) Whether the recommended sanction is within the range for like violations.

While there appear to be no cases directly on point, two (2) Mississippi Supreme Court cases discuss circumstances in which judges were suspended and disciplined for numerous violations, including abuse of process, procedural errors, and/or failure to perform duties.

The Commission in *Mississippi Comm'n on Jud. Perf. v. Spencer*, 725 So. 2d 171, 173 (Miss. 1998), after conducting a formal hearing, recommended to the Mississippi Supreme Court that Prentiss County Justice Court Judge Howard Junior “Buster” Spencer be suspended pending the outcome of his proceeding before the Court. The Commission’s Petition for Interim Suspension was filed on December 18, 1997 and granted by the Court on March 12, 1998. *Spencer*, 725 So. 2d at 173. Ultimately the Court agreed with the Commission’s recommendation of removal and assessment of costs. *Id.*

The Commission concluded that Judge Spencer engaged in 25 counts of judicial misconduct, described by the Court as “varied and far reaching.” *Spencer*, 725 So. 2d at 176. The Court stated that “[e]ach of the twenty-five counts fits into one of the following categories, (A) Ex Parte Communication, (B) Demeanor and Impartiality, (C) Failure to Perform Duties, and (D) Sexual Misconduct and Harassment” and “directly relate to specific Canons of the Code of Judicial Conduct.” *Id.* at 177. After considering “the variety of allegations and an independent careful study of the entire record,” the Court found that the

allegations against Judge Spencer were “supported by clear and convincing evidence and constitute willful misconduct.” *Id.* at 182.

Again in *Mississippi Comm’n on Jud. Perf. v. Willard*, 788 So. 2d 736, 738 (Miss. 2001), the Commission recommended to the Mississippi Supreme Court that Sharkey County Justice Court Judge Ellis Willard be suspended from office pending the outcome of his proceeding before the Court. The Commission’s Motion for Interim Suspension was granted in an order handed down by the Court on October 12, 2000. *Id.* at 738. Ultimately the Court agreed with the Commission’s recommendation and removed Judge Willard from office for 24 counts of judicial misconduct, including *ex parte* communications, misuse of contempt powers, abuse of process and partiality, and lack of integrity and candor throughout the investigatory process. *Id.* at 738-39.

The *Willard* Court explained that the “record contain[ed] numerous examples of abuse of process and partiality”, some of which include improper collection of judicial court fines, revisiting cases already adjudicated, accepting pleas of litigants over the telephone, continuing cases *ex parte* without notice, attempting to interfere with cases from other jurisdictions, granting dismissals and interviewing witnesses *ex parte*, rewriting the terms to contracts, using the criminal process to collect a civil debt, and failing to afford various witnesses and defendants with “due process as required under both the state and federal constitutions.” *Willard*, 788 So. 2d at 743-44. Finding that Judge Willard’s “actions constitute violations of Canons 1, 2, and 3 of the Code of Judicial Conduct,” the Court concluded “that Judge Ellis Willard [was] guilty of willful misconduct in office, willful and

persistent failure to perform duties of his office, and conduct prejudicial to the administration of justice.” *Id.* at 745.

In the present case Respondent, like Judges Spencer and Willard, engaged in *ex parte* communications, failed and/or willfully avoided giving notice and due process to affected parties, committed numerous procedural errors, failed to perform the duties of his office, and demonstrated a lack of integrity and candor in testimony in the show cause hearing.

2) The gravity of the offense charged.

Respondent entered numerous *ex parte* orders without (1) petitions ~~ever~~ being filed with the clerk or presented to him for filing or (2) notice to the Conservator, and at least one of which benefitted Respondent’s nephew to the detriment of the Conservator. As discussed in detail above, included among those *ex parte* orders are the following:

(a) An Order denying the request to purchase a home located at 132

Hummingbird Road, Magee, Mississippi for the Newsomes. In chambers, Respondent confided in witnesses that the home was located in a predominantly Caucasian neighborhood, and he did not feel the Newsomes, who are African American, would feel comfortable there. Respondent thereafter ordered the purchase of real estate to build a home for the Newsomes, a decision unsupported by evidence and one which Respondent appears to have reached on his own as early as the settlement hearing. Respondent met with McNulty to discuss the five (5) general contractor bids she obtained for the construction of the Newsome home. Respondent knew

the amount of the five (5) bids and that the lowest bid was submitted by his nephew, Chad Teater, the owner of C.T. Construction. Upon discovering that the C.T. Construction bid was much lower than the other bids received, Respondent directed McNulty to have Teater raise his bid. C.T. Construction was awarded the contract to build the Newsome house.

(b) An Order Transferring Cause for Limited Purpose, which transferred the case to the district's other Chancellor for the "limited purpose" of approving and accepting a bid for construction of the Newsome home and specifically directed that the cause be transferred back to Respondent after the awarding of the bid. Respondent initially transferred the case because he knew he had a conflict due to his nephew's involvement as a bidder. Yet, knowing that the construction and completion of the home by his nephew, whom he knew had submitted the lowest bid, would require continued oversight by the court, Respondent specifically directed that the matter be transferred back to him after the bid was awarded.

© An Order declaring, without an inspection, that the Newsome residence was complete, that Respondent's nephew was released, that his nephew's only remaining duty was for a limited one-year new home warranty, and authorizing payment of a \$6,000.00 final draw to his nephew. Contrary to the New Home Warranty Act, however, that order conditioned his nephew's obligation to perform that warranty on a finding by the court that a repair or replacement

was necessary, and it purported to eliminate the Conservator's six-year warranty and her common law remedies against Respondent's nephew.

(d) Orders approving attorney's fees to McNulty for performing services for which she was not qualified and without petitions, notice, evidence that the increased sum was warranted, or properly itemized time sheets/billing statements and, in one instance, an order increasing McNulty's fee for services she had not performed and without any request from her for that increase.

(e) With knowledge that McNulty was the attorney for the Conservator, Respondent directed McNulty to perform duties concurrently for Victoria, including supervision of the construction of the residence, for which Respondent later signed an order formally appointing McNulty guardian *ad litem*. Not only was McNulty unqualified to supervise that construction, Richard Courtney had advised Respondent at the settlement approval hearing that he and his firm were experienced in those matters and that he considered it to be his responsibility to handle those duties, an offer which Respondent ignored. Respondent's directive to McNulty to undertake those and other duties on behalf of Victoria created a conflict with McNulty's duties to the Conservator.

Litigants, attorneys, witnesses and citizens who appear in court or come to court for assistance deserve an independent, just, and impartial judiciary and in this case that was not provided, as a result of which harm was suffered. The public's confidence in and perception

of the judiciary as a whole was diminished. Respondent ignored the mandates of the Judicial Code of Conduct as well as the laws and rules that govern practice before Mississippi state courts, to the detriment of both attorneys and litigants who appeared before him, conduct which cannot be allowed to continue.

3) Examination of the options available to the Commission.

Section 177A of the Mississippi Constitution of 1890, as amended, allows the Commission to make recommendations to the Mississippi Supreme Court regarding disciplinary sanctions against judges, i.e. removal from office, suspension, the levy of a fine, public censure, or reprimand. Section 9-9-13 of the Mississippi Code of 1972, Annotated, in pertinent part states, “[e]xcept as otherwise provided in Section 25-3-36(6), on recommendation of the commission on judicial performance, the Supreme Court may disqualify a judge from exercising any judicial function, without loss of salary, during the pendency of proceedings before the commission or in the supreme court.” The Commission recommends to the Supreme Court that Respondent be temporarily suspended with pay. The Commission cannot allow Respondent to damage the public’s perception of the judiciary but must instead take steps to assure the public that its judges respect and honor their judicial offices as a public trust and strive to enhance and maintain confidence in our legal system.

Respondent is charged with willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. An interim suspension is an extraordinary remedy which the Commission has only sought under unusual circumstances. For the reasons detailed in the foregoing Findings of Fact and summarized

above, interim suspension of Respondent is appropriate, and necessary to preserve the public's confidence, while the Commission and ultimately the Mississippi Supreme Court finally determine whether Respondent has violated Canons 1, 2A, 2B, 3B(1), 3B(2), 3B(5), 3B(7), 3B(8), 3C(1) and 3E of the Code of Judicial Conduct for Mississippi Judges.

The charges contained in the Commission's Formal Complaint are extremely serious and, if established, Respondent must be sanctioned. The public's confidence in the integrity and impartiality of the entire judicial system is at stake. A suspension would send a clear message to Respondent, the judiciary and the citizens of Mississippi of the high ethical standards required of our judges and of the importance of the integrity and impartiality of our judiciary.

CONCLUSION

Respondent has failed to show cause why Respondent should not be suspended from performing his judicial duties during the pendency of the Commission's Inquiry Concerning a Judge No. 2013-082, in accordance with the Constitution, the laws of the State of Mississippi and the Rules of the Commission. Accordingly, the Commission recommends to the Supreme Court of Mississippi that Respondent be suspended, with pay, from performing his duties until such time as the Commission has completed its inquiry, made its final recommendation to this Court, and this Court has entered its ruling. The Commission submits that this recommendation should be upheld in the best interest of the judiciary and

administration of justice in Mississippi, and that the Respondent herein be suspended accordingly, and at this Court's earliest possible convenience.

Respectfully submitted,
MISSISSIPPI COMMISSION
ON JUDICIAL PERFORMANCE

/s/ Darlene D. Ballard
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CERTIFICATE OF SERVICE

I, Darlene D. Ballard, Executive Director for the Mississippi Commission on Judicial Performance, do hereby certify that I have this date electronically filed the foregoing pleading or other document with the Clerk of the Mississippi Supreme Court using the MEC system which sent notification of such filing to the following:

Robert E. Evans, Esq.
P.O. Box 636
Monticello, MS 39654-0636

I, Darlene D. Ballard, also certify that I have this date mailed, postage pre-paid, a copy of the foregoing Memorandum Brief on Behalf of the Mississippi Commission on Judicial Performance in Support of the Commission's Petition for Interim Suspension to the following:

Judge H. David Clark, II
Commission Chairman
660 North Street, Suite 104
Jackson, Mississippi 39202

This the _____ day of _____ 2014.

/s/ Darlene D. Ballard
Darlene D. Ballard